MEMORANDUM

OFFICE OF THE CITY ATTORNEY
ROOM 800 – CITY HALL

HAGOPIAN MEMO NO. 1

TO: MEMBERS, SPECIAL COMMITTEE ON TAX EXEMPTIONS, Wisconsin Legislative Council Special Committee On Tax Exemptions For Residential Property (*Columbus Park*, 2003 WI 143), 2003 WI Act 195, 2003 SB 512

FROM: GREGG C. HAGOPIAN, Assistant City Attorney

DATE: November 2, 2004

RE: Initial Reactions; Past Efforts to Deal With "Benevolent"; Public Policy; Field Trips

---

1. INITIAL REACTIONS TO LEGIS. COUNCIL'S STAFF BRIEF 04-5.

A. Leg. Council's brief 04-5 provides an excellent, and quick overview.

B. **Benevolent.** Commonlaw, legislative history, and practical experience in Wisconsin show that much uncertainty and trouble is due to Legislature's failure to define "benevolent" for purposes of Wis. Stat. § 70.11(4). Current analyis of "tenant-identity" and "rent-use" restrictions in § 70.11's preamble, should be considered along with analysis of the undefined term "benevolent" in § 70.11(4).

C. **Charitable.** Note, as Leg. Council brief shows on page 8, Legislature, in § 70.11(3)(b) used the word "charitable" instead of "benevolent," – to wit:

> "…a university or college may also lease property for educational or charitable purposes without making it taxable if it uses the income derived from the lease for **charitable** purposes." (Emphasis added).
>
> And, as per Leg. Council brief page 8, quoting the Supreme Court in *Columbus Park* at 671 N.W.2d at 644, the Court seemed to equate "charitable" with "benevolent" for purposes of § 70.11(4).
>
> The notion of requiring "charity" as a condition to exempting a "benevolent" owner makes sense.

D. **Who was "benevolent" association?** The Leg. Council points out that, in the *Columbus Park* case, Kenosha accepted that Columbus Park Housing Corporation is a "benevolent association" for purposes of § 70.11(4). However, isn't the true "benevolent party" in the case the federal government who provides the subsidy so that the corporate owner ends up getting "market rent?" See, e.g., *Partnership for Affordable Housing, Ltd. Ptnp. Gamma v. Bd. of Review, City of Davenport*, 550 N.W.2d 161, 1996 WL 333132 (S.Ct. Iowa 1996); *Supervisor of Assessments of Baltimore City v. Har Sinai West Corporation*, 95 MD App 631, 622 A.2d 786 (Ct. App. MD 1993).

E. **Low-Income Owners Pay.** Keep in mind that, people/individuals are "for-profit" in nature and that Wisconsin does not exempt the normal low-income person/owner from property taxes. If Joe Smith, low-income, is lucky enough to realize the "American dream" by owning his own house, Joe gets taxed, and if he can't pay, government forecloses. In Wisconsin, low-income homeowners are not exempt. For example, while the Legislature in 70.11(4g) exempts property owned by Habitat-for-Humanity organization during rehab, once Habitat sells the parcel to the low-income buyer, that buyer (along with elderly home owners on fixed incomes and other homeowners) pays property tax.

F. **Recent Case – Columbus Park.** The Supreme Court decided the case by decision dated November 19, 2003, and almost immediately thereafter, there was a flurry of bills, with actual legislation adopted less than 5 months later on April 8, 2004 (2003 WI Act 195, § 3, 2003 SB 512).

G. **Solution Needed.** The fact that (a) many of the bills called for a sunset, (b) the bill passed called for this study committee, and (c) Kenosha is still litigating with Columbus Park over the "rent-use" restrictions in § 70.11's preamble, all show, convincingly, that a *clear and balanced* legislative solution is needed. See, *Columbus Park Housing Corporation v. City of Kenosha*, Kenosha County Circuit Court Case No. 03-CV-962, now pending.

H. **Non-Exempt Low-Income Housing Providers Get a Tax Break Via Lower Assessment.** Keep in mind that HUD-low-income-housing landlords can be for-profit or nonprofit owners. Even though Wis. Stat. § 70.32(1) requires "real property" (defined in 70.03 to include not only land and buildings but all "rights and privileges appertaining thereto") to be assessed at full value, per *Metro. Holding v. Bd. Rev. City of Milwaukee*, 173 Wis. 2d 626, 495 N.W.2d 314 (1993), one could argue that the for-profit, or nonexempt, low-income-federally-subsidized-low-income-housing provider gets a tax break because, under common law, the assessed value of that owner's parcel, measured by the income approach, is not at market rent, but at actual income and expenses of the property. Thus only the value that the landlord receives from the tenant gets assessed and taxed – not the value of subsidization that the tenant (and landlord) benefit from, yet those are rights and privileges appertaining to the parcel under 70.03. See, also, *Mineral Point Valley Ltd. Ptnp. V. City of Mineral Pt. Bd. Rev.*, 2004 WI App.

158; *Bloomer Housing Ltd. Ptnp. V. City of* Bloomer, 2002 WI App. 252; Walworth *Affordable Housing, LLC v. Village of Walworth*, 229 Wis. 2d 797, 601 N.W.2d 325 (Ct. App. 1999).

2. PAST HISTORY SHOWS NEED TO DEAL WITH "BENEVOLENT" - EFFORTS TO CHANGE "BENEVOLENT" TO "CHARITABLE."

A. **1897-1969**: **St. Joe's Line** of cases (as discussed in the "Government-5 Report") is the *sole* line of cases in place. Commonlaw requires charity to be benevolent. Admission and serving of people without regard for ability to pay.

B. **1967**: **BRHA Added.** Legislature amended § 70.11(4) to add the "benevolent retirement home for the aged" ("BRHA") standard to clarify that, "*benevolent* associations" under § 70.11(4), can and do include, "*benevolent* nursing and retirement homes for the aged." *Milw. Protestant Home for the Aged v. City of Milw.*, 41 Wis. 2d 284, 164 N.W.2d 289, 293 (WI S.Ct. 1969). The Report of the Joint Survey Committee on Tax Exemptions of the Wisconsin Legislature stated that the amendment was intended to: "clarify the present exemption accorded to a limited amount of property owned by *benevolent* associations by making it clear that the exemption covers *benevolent* nursing homes and homes for the aged . . .. The . . . amendment is desirable as a matter of public policy as it clarifies an existing statute which has been misinterpreted by some local property assessing offices. . .." Id. at fn. 5. Thus, in 1967, the legislature was satisfied with the St. Joe's Line, and merely wanted to clarify that non-profit, retirement homes for the aged that provide charity and service without regard to ability to pay, and with volunteer labor, are exempt under § 70.11(4).

C. **1969**: **Milw. Protestant Line.** The beginning of confusion. Wisconsin Supreme Court sidesteps 11 of its prior decisions (i.e. the St. Joe's Line) and issues *Milw. Protestant Home* decision, starting the new Milw. Protestant Line of cases that, to this day, co-exists and conflicts with the St. Joe's Line. Defines "benevolent" as not requiring any charity. No alms-giving or charity required. Service provided only to own members who must pay. Ignores strict construction rules, legislative intent.

D. **1977**: **AG Says There Must Be Limits.** In 66 OAG 232 (8/10/77), the Wisconsin Attorney General addressed the issue of § 70.11(4) property-tax exemption for nonprofit apartments for the elderly that may be occupied by those younger than 62 who are not retired and where services like meals, housekeeping, and nursing care are not provided because residents must be able to live independent of such support services. The Attorney General discussed the *Milw. Protestant Home* case and reiterated its basic holding. The Attorney General did, however, also say that:

> "In order to qualify as 'benevolent', the persons to be benefited need not be 'objects of charity,' but the classification must have some limits, *i.e.*,

> '[t]o help retired persons of moderate means live out their remaining years.' 41 Wis. 2d at 300. Further, all phases of the operation of any such retirement home should have the common denominator of serving aged and retired persons. 41 Wis. 2d at 301. Also, there must be a significant age limitation as to occupant eligibility. It has been said that the age of 65 is generally considered the 'threshold to old age.' *State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 9, 139 N.W.2d 585 (1966). Although it is difficult to say at what age a person becomes 'aged,' and an occupancy eligibility limited to persons over 62 years of age would probably not be subject to question, there must be some further limitation to ensure that these apartments are not occupied by persons who are neither retired or aged. And, as stated before, it must always clearly appear that the corporation is completely free from even the possibility of profits accruing to its founders, officers, directors or members."

See, also, Manual p. 22-6, p. 21.7-8. So while the Attorney General failed to recognize the conflicting St. Joe's Line of cases, he did recognize that there must be limits.

E. **1979**: **DOR Says There Must Be Limits.** In 1979, the Department of Revenue issued a 12/20/79 legal opinion (Manual pp. 22-6, 21.7-8). Like the Attorney General, the DOR failed to recognize the St. Joe's Line of cases, and it accepted the Milw. Protestant Line. But, like the Attorney General, the DOR also opined that there must be limits. The DOR stated that, it would be "questionable whether providing 'deluxe type housing for the elderly' would qualify as a benevolent purpose." Specifically, the DOR opined that:

> "It is my observation that the spirit of the law providing for exempt status of property may be defeated when a project is motivated by a 'need for a more deluxe type housing for the elderly.' It is stated that local HUD housing is too small and inadequate to meet the needs of the people impressed with the proposed project. The project is aimed to meet the needs of 'elderly ladies and elderly married couples (who) are living in large beautiful homes.' It is questionable whether the needs of the elderly in this instance are of the type intended by the exemption. The *Milwaukee Protestant Home* case was a close 4-3 decision and involved housing for elderly persons of modest resources."

F. **1987**: **Legis. Audit Bureau Recommends Defn. of "Benevolent".** A 1987 State Legislative Audit Bureau Report found that Courts had broadly stretched the definition of "benevolent," beyond the Legislature's intent, to mean simply "doing good." The report recommended that the Legislature adopt a clear statutory definition for the word "benevolent." While the report did not articulate or recognize the two, co-existing, contradictory lines of cases, it did recognize that, under cases like *Milw. Protestant Home*, local assessors were exempting "retirement homes which charge large entrance fees, yet do not necessarily admit

the financially needy. In one municipality, a religious organization is building a retirement home which will be operated beginning in 1987 as a cooperative, with shares in excess of $100,000 sold to residents. While it appears that this situation is no different from a purchase of the condominium where an owner pays property taxes, the local assessor believes this retirement center may be granted an exemption as a benevolent retirement home because the courts have ruled that 'helping retired individuals live out their remaining years is benevolent, whether or not it is charitable!'" P. 16 Legislative Audit Report. Furthermore, the Report questioned allowing exemptions where "the primary use of the tax exempt property is to benefit the members" as opposed to the community as a whole. (P. 22, Legislative Audit Report).

G. **1990: Special Committee.** Legislative Council established Special Committee on Exemptions from Property Taxation. Special committee was directed to review property-tax exemptions and recommend whether any should be revised, repealed, or supplanted by a service fee.

H. **1991. Special Committee Report – Calling For "Charitable".** Special Committee (i.e. Special Committee on Exemptions from Property Taxation established by the Legislative Council in 1990) makes recommendations that are reflected in Wisconsin Legislative Council Report No. 7 to the 1991 Legislature. Recommendations are:

(1) 1991 AB 497: imposition of service fees on most types of real property exempt from property tax.

(2) 1991 AB 498: Due to for-profit operators' concerns about unfair competition by non-profit, exempt entities, suggestion to change statutory taxed-in-part under then 70.11(8) so that the measure would be U.B.I.T. instead of "pecuniary profit." This bill, among other things, would also amend 70.11(27) concerning M&E equipment and its "exclusive use" to be 95%.

(3) 1991 AB 499: Among other things, this bill (based largely on Florida law) would replace the word "benevolent" in 70.11(4) with "charitable." So that the exemption would be for non-profit, charitable associations providing charitable service (defined as a function or service which is of such community service that its discontinuance may result in the allocation of public funds for the continuance of the function or service) to a reasonable amount of persons based on ability to pay. Particularly, the Special Committee believed that "organizations, including nursing homes and retirement home for the aged, should do more than 'do good' for the community and operate not-for-profit in order to qualify for a property tax exemption." Pg. 29 of WI Legislative Council Report No. 7 (RL 91-7). Joint Survey Committee on Tax Exemptions determined this bill to be

legal and *good public policy*. But, bill died in Assembly Ways and Means Committee.

I. **Also 1991**. After 1991 AB 499 died, the biennial budget bill (1991 AB 91) was amended to incorporate most of what was in 1991 AB 499 – except that benevolent nursing homes and retirement homes for the aged would be exempt if they had IRS 501(c)(3) status. Governor Thompson signed AB 91 into law (1991 Act 39) but only after vetoing the AB 499 provisions amending 70.11(4). The Governor explained that **(i)** using IRS 501(c)(3) status as a standard for state-property-tax exemptions would expand the number of exemptions, and **(ii)** some 501(c)(3) corporations are neither benevolent nor charitable. See 1991 Act 39 §1706m. However, 70.11(8) was repealed and recreated by 1991 Act 39 §1706t (U.B.I.T. adopted as statutory taxed-in-part measure).

J. **1993**. Various efforts. **"Charitable".**

(1) 1993-95 state budget bill, 1993 SB 44: replace "benevolent association" under 70.11(4) to defined "charitable association" standard in general, and for retirement homes but not for nursing homes. Non-profit organization would have to provide services free, at nominal cost, or based on ability to pay, and be of such benefit to community that discontinuance of service might result in allocation of public funds to continue service. The proposal was later removed from the budget bill by the Joint Committee on Finance.

(2) 1993 SB 256/AB 456. After removal from the budget bill (1993 SB 44), the matter was reintroduced as these companion bills. The fiscal note to SB 256 explained that, residents of retirement homes that would become taxed under the bill, could get Homestead Credit if they qualified and School Property Tax Credit. Both bills died in the Joint Survey Committee on Tax Exemptions. Then DOR Secretary Bugher had written a 10/11/93 memo to the Committee urging it to at least amend 70.11(4) so that "benevolent retirement homes for the aged" would be required to provide charitable services (i.e. charge substantially below cost) to at least 50% of its residents.

K. **1994. DOR Proposal to Est. Income Limit Using Homestead.** Because of problem – 70.11(4) exemptions being granted to homes that "provide relatively luxurious services at market rates," and that "do not serve populations in need of charity care" – DOR proposed narrowing 70.11(4) exemption for retirement homes so that at least 50% of occupants would have to have household income for the prior year that would qualify for Homestead Credit (then, the limit was $19,154).

L. **1995. Proposal to Est. Income Limit Using Homestead.** Motion No. 646 by Joint Finance Committee Co-Chair Senator Joe Leean to narrow 70.11(4)

exemption for "benevolent retirement homes for the aged" to only facilities where 50% or more of the residents were at or below the Homestead Tax Credit eligibility level. Motion, however, was never introduced in the Joint Finance Committee.

M. **1996. DOR Effort to Require "Charity".** DOR, influenced by proposals in Pennsylvania, and still recognizing a problem with the BRHA standard, issues memo recommending elimination of BRHA in 70.11(4) and replacing it with "charitable retirement homes for the aged" that are free from profit motive, that provide housing services to a substantial number of residents for fees that do not fully cover the cost of the service, and that benefit a substantial class of persons who are legitimate subjects of charity.

N. **1997. Effort to Require "Charity".** During Joint Finance Committee deliberations concerning 1997 SB 77 (the 1997-99 biennial budget bill), Senator Wineke offered Motion No. 1750 that was adopted by a 12 to 4 vote, and that approved the DOR's 1996 proposal. And, while that motion by Wineke was eventually deleted, the Legislature instead created the "Benevolent Retirement Home for the Aged" Legislative Taskforce. 1997 Act 27.

Wineke, however, went on to introduce 1997 SB 261 that contained the language in his Motion No. 1750. The Joint Survey Committee on Tax Exemptions determined SB 261 to be legal and *good public policy*. But, it died in the Senate Health, Human Services, Aging, Corrections, Veterans and Military Affairs Committee without a hearing.

O. **1999. Efforts to Improve Limits.** LRB 2194/3 is drafted pursuant to which 70.11(4) "benevolent association" would be defined to mean **(i)** non-profit, **(ii)** providing service that predominantly and directly benefits the public, **(iii)** does not limit or restrict services based on resident's or client's ability to pay, and **(iv)** requires that at least 50% of residents of a benevolent retirement home be 65 or older. Never introduced as a bill.

P. **1999. *Deutsches Land*.** Wisconsin Supreme Court decides *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 591 N.W.2d 583 (WI S.Ct. 1999) making it clear that the Strict Construction Rules must be respected with respect to interpretation of 70.11(4) property-tax exemption.

Q. **2000. The Benevolent Retirement Home for the Aged Taskforce**. As indicated, 1997 Act 27 created the BRHA taskforce to "investigate the property tax exemption for benevolent retirement homes **and all problems that are associated with it**" (emphasis added), and it required the taskforce to submit to the legislature a report and proposed legislation to address the problems associated with the BRHA standard. The language of Act 27 shows that the Legislature felt that the "benevolent retirement home for the aged" ("BRHA")

standard in § 70.11(4) is problematic – especially when one considers how that standard has been interpreted by the courts.[1]

The taskforce met in 1999 and in 2000, and in 2000, issued three competing/minority reports.

The Government-5 Report (2000)[2] urged change and offered a solution that would exempt nonprofit licensed nursing homes that accept Medicaid and HUD § 202 low-income-elderly housing out-right, and nonprofit, non-nursing home, elder-living facilities and nonprofit, non-Medicaid nursing homes to the same extent those facilities serve persons age 65 or older in financial need (incomes at or below the Homestead Credit Limit).

The Sauer Proposal (2000) would define BRHA as housing for older persons under § 106.04(1m)(m) (i.e. housing under a state or federal program for the elderly, occupied by those 62 or older that may (but are not obligated to) provide care or services beyond room and board. BRHA's, nursing homes, CBRF's, RCAC's and CCRC's would be exempt if they were income-tax exempt, they maintain a policy of not kicking out those who, after being admitted (but it's O.K. to screen applicants for ability to pay), cannot pay, who operate without private inurement, who publish fees or donations paid to local government for municipal service (but there would be no requirement for the facility to actually pay local government), who are supported in whole or part by donations or gifts (but, for example, would one $5 gift satisfy this requirement?), and where the residents may be required to pay for housing or services in whole or part.

The Kittleson-Zielski Proposal (2000) would allow exemption to any property owned or managed "in a material way" by a nonprofit corporation whose mission and services are designed to meet the health, housing, and financial-security needs of the elderly, and whose purpose is to be helpful to the elderly without immediate expectation of material reward, where the entity is supported in whole or part by donations and gifts, the residents may be required to pay in whole or part, and there is no private inurement.

The Legislature did not take any action on any of the reports issued.

R. **2003.** TABOR and Columbus Park.

---

[1] See 1987 State Legislative Audit Bureau Report ("L.A.B.") "A Review of Property Tax Exemptions", pg. 3, ". . . there is a need to amend the statutes to more clearly define the scope of the exemptions which have been granted. Court decisions …. have broadly applied the exemptions granted to educational and benevolent organizations." See, also, p. 15 of report, "courts appear to have defined benevolent as nonprofit and simply 'doing good'."

[2] Available on-line at www.waao.org/taskforce.

S. **2004.** This taskforce and TABOR.

T. **2005.** TABOR efforts likely to continue.

U. As the above history shows, there have been numerous efforts to get the Legislature to clarify Wis. Stat. § 70.11(4) so as to impose some restrictions, or definitions, on "benevolent" that would require "charity," and that would limit the exemption more to only those truly in need (i.e. the St. Joe's Line approach, rather than the Milw. Protestant Line approach).

3. PUBLIC POLICY.

A. Actual use of property (not use of money from property) should determine entitlement to property-tax exemption.

(1) Must separate and distinguish property-tax concept from income-tax concept.

(2) Use of money from property should remain as a standard to *disqualify* from exemption (e.g. private inurement, etc.) but not to qualify for exemption. One expects a non-profit owner to use its money from its operations for nonprofit purpose.

(a) Use of money can cause loss of exemption. But, it should not be a test for granting of exemption.

(b) Property-tax exemption properly focuses on use of property rather than use of money from property.

(3) "Cross-subsidization" should not be the test for property-tax exemption (i.e. where money from operation-X at parcel funds operation-Y at parcel).

B. Uniformity and equal protection must be respected. In turn, unfair competition issues will be addressed. Currently, some nonprofits directly compete with for-profits and the nonprofits enjoy exemption not available to the for-profits. *Saint Joseph's Hospital of Marshfield, Inc. v. City of Marshfield*, 2004 WL 1946144 (Wis. App., Sept. 2, 2004), ¶16, "After all, what need is there to grant tax-exempt status to a facility that simply competes with taxpaying facilities. . .?"

C. "Public benefit" rather than "self-benevolence for members only" should prevail. It makes sense for government to "subsidize" particular owner's operations because there is a public benefit; owner performs services primarily for public (not simply/primarily to benefit its own members), and relieves government from expense (lessens government burden because otherwise government would be expected to provide service).

D. "Self benevolence" results in unfair competition and violations of equal protection and uniformity. See, also, the Elks case, supra.: ". . . privileges and benefits which every person may secure for himself and family for a consideration, according to his tastes, wishes and means, and which the members of this lodge thus provide by co-operation as a body for their mutual advantage, are not of a benevolent character, and serve no such purpose." 100 N.W. 837, 839.

E. In working toward a solution, we must be ever mindful that the low-income owner must pay property taxes (his own tax plus his share of the tax avoided by exempt entities). "A new study released by the Wisconsin Policy Research Institute confirmed what many Wisconsinites already suspect. Not only are our taxes among the highest in the nation, they far exceed the average person's ability to pay." Wisconsin Conservative Digest, Vol. 2, Issue 8, p. 1 (October, 2004).

4. CALL FOR FIELD TRIPS, TABOR-COMMITTEE COORDINATION?

A. In addition to the speakers lined up. Committee members should actually see places. Suggestion: committee should take field trips.

B. Possible to have overlapping meeting with TABOR Committee to be formed?

5. SUNSET PROVISION OF SB 512 REMOVED.

A. SB 512 intro'd March 1, 204 by Sen. Roessler and Stepp, and referred to Jt. Survey Comm. on Tax Exemptions.

B. Jt. Survey Comm. issued March 4, 2004 report – bill is good public policy.

C. Bill referred to Senate Comm on Econ Develop, Job Creation and Housing for hearing on March 5, 2004. That Committee voted to introduce and adopt Senate Amend No. 1 on a 5-0 vote and to recommend passage of amended bill on 5-0 vote.

D. Senate vote was 32-1. Assembly vote was 90-9.

E. Senate Amendment No. 1, deletes sunset provision.